

2006 WL 3203234 (Miss.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Mississippi.
Jackson County

The Estate of Freddie Irene WEISSNER by and through Donald Glenn, Administrator of the Estate of Freddie Irene Weissner, for the use and benefit of the Estate of Freddie Irene Weissner, and for the use and benefit of the Wrongful Death Beneficiaries of Freddie Irene Weissner, Plaintiff,

v.

DELTA HEALTH GROUP, INC.; Pensacola Health Trust, Inc.; Scott J. Bell; Scott A. Lindsey; John Does 1 Through 10; and Unidentified Entities 1 through 10 (as to Chateau Deville Nursing Center), Defendants.

No. 2001-00452(3).
March 17, 2006.

**Plaintiff's Response to Defendant Scott J. Bell's Renewal of Motion
to Dismiss or Alternatively, Motion for Summary Judgment**

The Estate of Freddie Irene Weissner by and through Donald Glenn, Administrator of the Estate of Freddie Irene Weissner, for the use and benefit of the Estate of Freddie Irene Weissner, and for the use and benefit of the wrongful death beneficiaries of Freddie Irene Weissner, [A. Lance Reins](#), Mississippi Bar No. 101031, Annette B. Mathis, Mississippi Bar No. 101237, [D. Bryant Chaffin](#), Esq., Mississippi Bar No. 100379, Wilkes & McHugh, P.A., Post Office Box 17107, Hattiesburg, MS 39404-7107, Attorneys for Plaintiff.

Plaintiff files this Response to Defendant Scott J. Bell's Renewal of Motion to Dismiss or Alternatively, Motion for Summary Judgment. By moving for Summary Judgment, Defendant ignores the heavy burden placed upon him by the Mississippi Rules of Civil Procedure and by substantial Mississippi precedent:

For a summary judgment motion to be granted there must exist no genuine issues of material fact and the moving party must be entitled to judgment as a matter of law. [Miss. R. Civ. P. 56\(c\)](#). ... The evidence must be viewed in the light most favorable to the party against whom the motion has been made.... Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is the non-movant would be given the benefit of the doubt.

[Leflore County v. Givens](#), 754 So. 2d 1223, 1225 (Miss. 2000) (citing [Quinn v. Mississippi State Univ.](#), 720 So. 2d 843, 846 (Miss. 1998) (collecting authorities)).

On the other hand, the burden on Plaintiff, as the non-movant, is light:

All that is required of a non-movant to survive a motion for summary judgment is to establish a genuine issue of material fact by the means available under the rule. Furthermore, it is standard practice that “(a)ll motions for summary judgment should be viewed with great skepticism and if the trial court is to err, it is better to err on the side denying the motion.”

[Simmons v. Thompson Mach. of Miss., Inc.](#), 631 So. 2d 798, 801 (Miss. 1994) (quoting [Claiborne County Bd. of Educ. v. Martin](#), 500 So. 2d 981, 981 (Miss. 1986) (citing [Lyle v. Mladinich](#), 584 So. 2d 397, 398 (Miss. 1991))).

It is clear that Defendant has not met his burden and his Motion must be denied. For the reasons set forth below, Plaintiff has clearly established that genuine issues of material facts exist as to Plaintiff's claims against Defendant, and summary judgment would be inappropriate.

I. INTRODUCTION

On or about August 1999, at the age of seventy-one, Freddie Irene Weissner was admitted to Chateau Deville Nursing Center, a nursing facility owned, operated, managed, and controlled by Defendants. She remained a resident of Defendants' facility until her death on October 5, 2000. During her residency at Defendants' facility, Ms. Weissner sustained horrific injuries as the result of Defendants' acts and omissions, including dehydration; infections; multiple falls; bone fractures; poor hygiene; malnutrition; multiple [pressure sores](#); overmedication; and ultimately death.

Defendant asserts that Plaintiff's Complaint has failed to state a cause of action for which he, as licensee of Defendants' facility, can be held liable. However, contrary to Defendant's assertions, Plaintiff may assert claims against Defendant based on the following:

1. Mississippi courts have entered judgments in favor of nursing home residents against licensees of nursing homes.¹
2. Mississippi common law imposes on nursing home licensees duties of reasonable care owed to their residents.
3. Mississippi statutory regulations impose on nursing home licensees duties of reasonable care owed to their residents.²
4. The Fifth Circuit Court of Appeals recently held that there was a possibility of reasonable recovery against non-diverse licensee Defendants, stating, "it is at least reasonable to expect that a Mississippi court might find that the allegations of the in-state defendants' misfeasance and nonfeasance are sufficient to state a claim under state law." [Gray v. Beverly Enterprises-Mississippi, Inc.](#), 390 F.3d 400, 2004 WL 2526544, 410 (5th Cir. 2004).

II. ARGUMENT

A. The licensee Defendant, as licensee and operator of Chateau Deville Nursing Center, owed both a common law duty of care and a non-delegable statutory duty of care to Freddie Irene Weissner.

Defendant, as licensee and operator of Chateau Deville Nursing Center, owed Ms. Weissner, as a resident of an institution for the [elderly](#) and infirm, a duty of care according to both common law and statutory law. See Licenses issued to Scott J. Bell certifying that during the years of Ms. Weissner's residency he was licensed "to maintain and operate an Institution for the Aged or Infirm according to [Section 43-11-9 of the Mississippi Code of 1972](#), as amended, on the premises described to wit: Chateau Deville Nursing Center." Ex. A. "A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." W. Page Keeton, *Prosser and Keeton on the Law of Torts*. § 53 (5th ed.). The Mississippi Supreme Court has determined that the duty in negligence cases may arise by statute or by common law:

The duty may arise specifically by mandate of a statute, or it may arise generally by operation of law under application of the basic rule of the common law which imposes on every person engaged in the prosecution of any *undertaking an obligation* to use due care, or to so govern his actions as not to endanger the person or property of others. ...

George B. Gilmore Co. v. Garrett, 582 So. 2d 387, 391 (Miss. 1991) (quoting *Pinnix v. Tooney*, 87 S.E. 2d 893, 897-98 (N.C. 1955)).

1. Defendant owed a common law duty of care to Ms. Weissner.

Mississippi common law clearly establishes that it is the duty of a nursing home *or its proprietor or owner* to use reasonable care for the safety of residents, consistent with each resident's age and physical condition. *Lagrone v. Helman*, 103 So. 2d 365, 368 (Miss. 1958). See also 24 Am. Jur. Proof of Facts 3d § 73 (2003) (citing *Payton v. Health Care Facilities, Inc. v. Estate of Campbell*, 497 So. 2d 1233 (Fla. 2nd Dist. Ct. App. 1986); *Associated Health Systems, Inc. v. Jones*, 366 S.E.2d 147 (Ga. Ct. App. 1988)). Plaintiff has alleged that this Defendant, as the licensee of Chateau Deville “Nursing Center, breached that duty of reasonable care owed to nursing home residents. As a result, Ms. Weissner suffered numerous injuries.

2. The licensee Defendant not only owed a common law duty of care to Freddie Irene Weissner, but he also owed a non-delegable statutory duty of care to Ms. Weissner.

In addition to the duty of care owed under common law, Mississippi nursing home licensees are charged with statutory duties of care owed to nursing home residents. The statutes and regulations that govern nursing home care, which are at issue in this matter, amount to a codification of the common law duty owed by nursing home licensees who assume the responsibility of care for the **elderly** and infirm, such as Ms. Weissner. The statutes governing institutions for the aged or infirm were enacted for the purpose of establishing standards that “will insure safe, sanitary and reasonably adequate care of individuals in such institutions.” *Miss. code ann. § 43-11-3*. In furtherance of that purpose, the *Mississippi Rules, Regulations, and Minimum Standards for Institutions for the Aged and Infirm (Minimum Standards)* were adopted and promulgated pursuant to a statutory grant of authority. Min. Stds., Reg.101.1.

In determining whether these regulations impose on nursing home licensees duties of reasonable care owed to residents, the Mississippi Southern District Court reasoned as follows: “The Mississippi Supreme Court has recognized that the rules, regulations and minimum standards adopted pursuant to an identical statutory grant of authority [with respect to hospitals] constitute affirmative duties, the breach of which constitutes a tort.” *LaBauve v. The Servicemaster Co.*, No. 3:OOCV785WS, at *6 (S.D. Miss. 2002), (citing *Palmer v. Anderson Infirmary Benevolent Assn.*, 656 So. 2d 790 (Miss. 1995)). Therefore, the court concluded that the nursing home regulations do, in fact, constitute affirmative duties:

[T]he Court finds that there is at least a possibility that the plaintiff may recover a judgment against defendant Julia Edwards [the nursing home administrator] under the allegations of the complaint.

[T]he plaintiffs cause is based on defendant Edwards' **alleged failure to comply with the mandates of Mississippi law, which delegated to her certain statutory duties for the benefit of nursing home residents** including the decedent. The plaintiff does not have to show that defendant Edwards had personal contact with the decedent to demonstrate a breach of the aforementioned statutory duties.

Id. at *9 (emphasis added).

A “licensee” is defined by nursing home regulations as “the person to which a license is issued and upon whom rests the responsibility for the operation of the institution in compliance with these rules, regulations, and minimum standards.” Min. Stds., Reg.102.16; see also Min. Stds., Reg. 402.1 (“The licensee shall be the person who the licensing agency will hold responsible for the operation of the home in compliance with these regulations.”). Moreover, these regulations impose a duty on the licensee to protect residents and preclude the licensee from entering into any agreement or contract “which will relieve the

licensee of responsibility for the protection of the person and of the rights of the individual admitted to the facility for care.” *Id.*, Reg. 404.3(b). When Defendant assumed his role as licensee of Chateau Deville Nursing Center, he undertook an obligation to ensure that the residents, including Ms. Weissner, were provided adequate and appropriate care.

Other jurisdictions have also recognized the importance of holding nursing home licensees liable for the breach of their non-delegable statutory duty to protect residents. For example, in *NME Properties, Inc. v. Rudich*, 840 So. 2d 309 (Fla. 4th Dist. Ct. App. 2003), the court affirmed an award of punitive damages against a nursing home licensee based on vicarious liability for the gross negligence of the facility's employees. The court rejected the corporate licensee's argument that it could not be held vicariously liable because the nursing home was operated through an independent contractor. The Court stated, “Generally, when an activity can be performed only pursuant to a license or franchise granted by a governmental entity, the licensee or franchisee remains responsible for the performance of the activity--no matter who actually performs it.” *Id.* at 313 (citation omitted).

Plaintiff has alleged that the licensee Defendant breached his statutory duties of care. He failed to adequately assess, evaluate, and supervise nursing personnel so as to ensure that Ms. Weissner received appropriate nursing care, in accordance with Defendants' policy and procedures manual, and *the statutorily mandated regulations implemented by the Mississippi Department of Health*. In violation of Mississippi Regulations 408.2(j); 503.2; 503.9 and 503.10, Defendant failed to provide even the minimum number of staff to meet the residents' needs. In violation of Mississippi Regulations 408.2; 503.2; 503.9; 503.10 and 503.11, Defendant failed to provide adequate supervision to staff to ensure that Ms. Weissner received adequate nutrition, fluids, sanitary care, and medications. As the court in *Rudich* recognized, Defendants, as licensee, remained responsible for the performance of these activities--no matter who actually performed them--or, as in this case, no matter who actually failed to perform them.

The evidence in this case supports Plaintiffs allegations. For example, two certified nursing assistants employed by the facility during Ms. Weissner's residency testified to staffing problems and the impact that such problems had on the standard of care that they were able to provide to residents. *See* Dep. Fayrella Handy 13:2 - 33:6 (Jan. 16, 2004), Ex. C and Dep. Tonya Harris 13:2 - 16:8 (Jan. 16, 2004) (testifying that a shortage of staff resulted in her not being able to assist residents who needed assistance with ambulating, grooming, and eating and not being able to promptly respond to residents' call lights), Ex. D. Ms. Harris further testified that during state inspections the facility had the necessary staff but that afterwards things returned “to the normal routine”. *See* Dep. Tonya Harris 21:19 - 23:24 (Jan. 16, 2004), Ex. D.

Additionally, Ms. Weissner's son testified to the substandard care and unsanitary conditions. *See* Dep. Donald Glenn 47:18 - 60:13 (Oct. 24, 2003) (testifying to seeing “beer cans everywhere” on the facility's grounds, finding his mom's room without air conditioning in August, smelling a terrible odor in his mom's room, finding his mom in a filthy shirt that “she had had on for at least, I know, a couple of weeks or so, at least”), Ex. E.

B. The licensee Defendant can be held liable for negligence notwithstanding his argument of lack of “hands-on” participation in providing care to Ms. Weissner.

Defendant claims that it is undisputed that he did not have any direct, personal participation in the care given to the residents of Chateau Deville Nursing Center. However, whether or not the licensee Defendant provided direct care to Ms. Weissner is irrelevant. Plaintiff has alleged that the licensee Defendant negligently committed certain acts and omissions that were within his area of responsibility. In addition to Defendant's failure to provide a sufficient number of qualified staff to adequately care for Ms. Weissner, Plaintiff has alleged that in violation of Mississippi Regulation 403.1 (a), Defendant failed to ensure that complete, accurate, accessible and organized medical records on Ms. Weissner were maintained in accordance with accepted professional standards. Defendant's negligent execution of his responsibilities proximately led to the injuries of Ms. Weissner. Whether or not Defendant gave “hands on” care to Ms. Weissner is irrelevant to this analysis.

The Mississippi Supreme Court has determined that liability can arise from participating, authorizing, directing or simply acquiescing in a tort:

A director, officer or agent is liable for the torts of the corporation or of other directors, officers, or agents when, and only when, he has *participated* in the tortious act, or has *authorized* or *directed* it, or has acted in his own behalf or has had any knowledge of, or *given any consent to*, the act or transaction, or has *acquiesced in* it when he either knew or by the exercise of reasonable care should have known of it and should have objected and taken steps to prevent it.

Turner v. Wilson, 620 So. 2d 545, 548-49 (Miss. 1983) (quoting 19 C.J.S. *Corporations* § 544 (1990)) (emphasis added). Further, in *Hill v. Beverly Enterprises-Mississippi, Inc.*, 305 F. Supp. 2d 644, 648 (S.D. Miss.), a case involving the potential liability of nursing home administrators, the Mississippi Southern District Court determined that “direct participation” does not mean “hands-on” participation:

[U]nder Mississippi law, particularly where the employee or agent of an employee charged with tort liability holds a managerial or administrative position, ‘direct participation’ does not necessarily mean ‘hands-on participation’ in the tortious act itself, so the fact that a nursing home administrator may not have participated in the day-to-day care of a resident is not determinative of the question of the administrator's potential liability.

(citing *Box v. Beverly Health and Rehabilitation Services, Inc.*, No.3:03CV22-SAA, slip op. at 6 (N.D. Miss. May 30, 2003)). The court rejected the defendants' “myopic view of ‘direct participation’ ” as requiring personal contact: “[I]t may rightly be said that the administrator personally and directly participated in the tort which caused the harm. There is no requirement of personal contact but rather of personal participation in the tort; and a breach by the administrator of her own duties constitutes direct, personal participation.” *Id.* at 647, 649; see also *Gunn v. National Heritage Realty, Inc.*, 2003 WL 23199867 (N.D. Miss. Nov. 4, 2003); *Estate of Willie Belle Barham v. Shady Lawn Nursing Home, Inc.*, No. 5:01CV129BRS, 15 *7-8 (S.D. Miss. Oct. 23, 2001).

Likewise, in *LaBauve*, the court rejected the defendants' argument that the administrator who had not had any contact with a nursing home resident could not be liable for injuries sustained by him:

It is irrelevant that defendant Edwards had no personal contact with the decedent. The plaintiff's cause of action is based on Edwards' alleged failure to comply with the mandates of Mississippi law, which delegated to her certain statutory duties for the benefit of nursing home residents including the decedent. The plaintiff does not have to show that defendant Edwards had personal contact with the decedent to demonstrate a breach of the aforementioned duties.

LaBauve, No. 3:00CV785WS, at *9.

In a similar vein, the court in *Bradley v. Grancare, Inc.*, No. 4:03CV93-P-B, at *6 (N.D. Miss. Aug. 18, 2003) rejected the argument that the plaintiffs' failure to allege that the defendants personally participated in the care of the nursing home resident established that there was no possibility of recovery: “The Complaint contains ample factual allegations directed specifically at [defendants]--chiefly their failure to maintain adequate records and to hire, train and supervise the staff who were charged with the day-to-day care of [decedent]--to afford a reasonable basis for imposing personal liability under Mississippi law.”

1. Defendant can be held liable for the negligence of “hands-on” care providers because a “person in charge” can be held liable for negligence.

Defendant can be held vicariously liable for the alleged acts of other employees such as nursing home nurses, certified nursing assistants (CNA's), therapists, etc. Plaintiff has not filed suit against the nurses, CNA's, and therapists. Rather, Plaintiff has alleged acts of negligence against Defendant--the licensee of Chateau Deville Nursing Center and the persons in charge to ensure that the nursing home was in compliance with the minimum standards of care established by statutory law.

A "person in charge of a premises" such as a nursing home licensee can be held liable for negligence. For example, in *Winston v. TB of Mississippi, Inc.*, 1999 WL 33537157, at *2 (N.D. Miss. 1999), the court held that Mississippi law "recognize[s] a negligence cause of action against a store manager, as well as the store owner, for failure to keep the premises reasonably safe or to warn of a dangerous condition."³ In the context of a nursing home licensee's potential liability, as the court in *Box v. Beverly Health and Rehabilitation Services, Inc.* reasoned,

If such a duty exists with respect to business relationships as fleeting as those that obtain in a fast-food restaurant, surely a like duty exists with respect to the day-to-day operator of a business, such as a nursing home, whose service caters directly to the ongoing physical and mental well-being of those it serves.

Box, No.3:03CV22-SAA, slip op. at 7.

2. An agent can owe a duty to both his employer and to third parties arising from acts and omissions committed in the course of employment.

Defendant, as licensee, owed a duty to both his employer and to Ms. Weissner, as a resident of Defendants' facility. Mississippi courts have found that nursing home administrators owe a duty to both the corporation and the residents. For example, in *Box v. Beverly Health and Rehabilitation Services, Inc.*, the Court found that the duties of an administrator may be owed to both the corporation and the residents:

The [District] court [in *Gray*, later overruled by the Fifth Circuit, *supra*] apparently took the view that a manager's duty of reasonable care is owed either to the plaintiff or to the corporate defendants but cannot be owed to both. *Gray* is not binding authority on the court in this case, and the undersigned respectfully declines to follow that construction of the question here. The court notes as well that binding authority such as *Winston* and *Hart* suggest that the duties of reasonable care owed by a manager to his employers and patrons are not mutually exclusive. *See Hart*, 199 F.3d at 247 (criticizing the district court's over-emphasis on the agent-principal relationship because such a "heightened test fails to recognize those situations in which an agent and his principal could be found jointly and severally liable for tortious conduct committed jointly by them.").

Box, No.3:03CV22-SAA, slip op. at 7 n.1.

Likewise, in *Hill v. Beverly Enterprises-Mississippi, Inc.*, the Mississippi Southern District Court found that a "duty is owed--or certainly could reasonably be found to be owed--not only to the owner of the nursing home, but also to the residents of the home." *Hill*, 305 F. Supp. 2d at 649 n.8.

Further, under Mississippi law, it is well-settled that an agent and its principal may be jointly and severally liable for torts committed against third parties. *See American Fire Protection, Inc. v. Lewis*, 653 So. 2d 1387, 1391 (Miss. 1995); *Holland v. Mayfield*, 826 So. 2d 664, 670 (Miss. 1999). For example, as the Mississippi Supreme Court held in *Mullican v. Meridian Light & Ry. Co.*, 83 So. 816, 819 (Miss. 1920):

The more modern rule is that the relation of agency does not exempt a person from liability for an injury to a third party resulting from his neglect of duty for which he would otherwise be liable. This liability is not based upon the contractual relation existing between the principal and agent, but upon the common-law obligation that all persons must so use that which he controls as not to injure another.

Similarly, in *Mississippi Power & Light Co. v. Smith*, 153 So. 376, 380 (Miss. 1934), the Mississippi Supreme Court emphasized that an agent may owe a duty to *both* its principal and to third parties for torts committed in the course of employment: “The rule now is that, if both the agent and master owe a duty to another, they may be held liable for a breach thereof jointly or severally, although the liability may spring from a different rule of law.” It follows that Defendant, as licensee, may be liable for the breach of a duty that he owes to *both* the nursing home corporation and to the nursing home residents. Defendant's status as agent of the nursing home does not shield him from liability: “An agent receives no shield from the fact that she is an agent or because her principle is also liable for the tort.... [B]oth principal and agent may be held accountable.” *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 191 (5th Cir. 1989).

C. The licensee Defendant breached his duty to Freddie Irene Weissner and this breach was the proximate cause of Ms. Weissner's injuries, including her death.

Substantial testimony in this matter clearly establishes that the care Ms. Weissner received at Chateau Deville Nursing Center was below the applicable standard of care, that Defendant knew or should have known of the substandard care, and that such care led directly to Ms. Weissner's injuries and ultimately, her death.

For example, Dr. Lige Rushing testified that Ms. Weissner was not turned often enough to prevent her severe [pressure sores](#) and that such sores contributed to her death:

Q. Okay. In terms of addressing her [pressure sores](#), what do you believe the nursing home should have done that you believe it didn't do?

A. Well, first of all, you know, they're called [pressure sores](#) because they result from pressure. And until you get the pressure off of them, they're to going to heal. So they need to have a well-organized, documented protocol for turning and repositioning, use the pressure-relieving devices, and - of various kinds. And they just didn't do that.

Q. Let me - let me ask you just straight out: Do you think that her [pressure ulcers](#), [pressure sores](#), whatever, caused or contributed to Ms. Weissner's death?

A. Yes, sir.

Q. And how so?

A. I think they contributed to death because of the associated tissue damage -- the necrotic tissue and infection that was present.

When this is present, the molecular chemistry of it is that phagocytes are [types of blood](#) cells that respond to information, and they're actively -- and they release chemicals that are called cytokines. These cytokines are [tumor necrosis](#) factor; interleukins, plate-activated factor. There are some others called bradykinin. There is a whole host of these.

And what these do is they cause end organ damage. They - it's kind of a - basically, the bradykinin slows the heart and can stop it. The [tumor necrosis](#) factor causes fever, tissue destruction, end organ damage, and the blood pressure drops. And these people die from [cardiac arrest](#).

Q. Okay. Are you going to testify that if Ms. Weissner had not developed any [pressure sores](#) during this time at Chateau Deville that she would not have died?

A. I will testify that she would not have died when she did had it not been for the [pressure ulcers](#).

Q. And my question is: Are you saying and is your testimony going to be that if she had no [pressure sores](#), that she would have lived for some significant period of time after October of 2000?

A. Yes, sir, I think she would have.

Dep. Lige B. Rushing, Jr., M.D. 48:10-49:8; 49:24-50:4 (Jan. 15, 2004), Ex. F.

Nurse Expert Gail King testified that Chateau Deville Nursing Center deviated from the nursing standard of care in the following nine areas: (1) [pressure sores](#); (2) fall and fall-like occurrences; (3) nutrition; (4) fluid restriction; (5) behavioral issues; (6) pain management; (7) contracture development; (8) fecal impaction; and (9) issues of concern. See Dep. Gail King, R.N. 28:6 - 33:23 (Jan. 6, 2004), Ex. G. Nurse King further testified that federal surveyors cited Chateau Deville Nursing Center for deficiencies in some of these areas:

Q. Do you expect to rely upon the survey in any way in terms of - - at trial rendering your opinions and explaining the deficiencies in the care that you believe occurred to Ms. Weissner?

MR. CIRCEO: Object to form.

A. Some of the deficiencies that were cited are similar to some of the problems and care issues that Irene Weissner did undergo during her stay at the facility.

Q. Which deficiencies in particular? If you need to look at the survey go ahead.

A. Yeah. The deficiency - - they had a deficiency regarding the formation of [pressure sores](#).

Q. What tag number is that?

A. 314, F314. They had a deficiency regarding significant change notification.

Q. What tag number?

A. F157.

Q. Okay.

A. They were cited for nursing service, F353.

Q. Okay.

A. And they were cited for F514, which is a documentation citation for incomplete clinical records.

Dep. Gail King, R.N. 14:23 - 15:19 (Jan. 6, 2004), Ex. G.

Further, contrary to Defendant's claim in his Motion, his own deposition testimony establishes that he knew or should have known of the substandard care. *See* Def. Scott J. Bell's Renewal of Mot. to Dismiss ¶ 16 (Feb. 20, 2006) (claiming that Plaintiff

cannot establish that Defendant knew or should have know of any alleged misconduct). For example, Defendant testified that he is informed of deficiencies in the standard of care, such as the ones described by Nurse King:

Q. Have there been occasions where a surveyor has brought a potential problem to the attention of Delta Health Group where they've investigated that?

A. To Delta Health Group?

Q. Yes.

A. Well, you know, **the survey is very specific to the site**, and I don't know - - that we get calls from survey teams or survey folks, to my recollection, that they would call directly to the home office. To my knowledge, that has not happened. **The information goes back to the facility, and the facility has an obligation to let us know if there's an issue.** There could be a breakdown there, but not to my knowledge.

Q. Well, is there someone at the home office who's supposed to receive copies of the surveys that are performed?

A. Yes. I'm sorry, yes.

Q. Who is that?

A. It would be Cindy Ledford

Q. What is Ms. Ledford's position?

A. She is our - - at the time was a **financial** analyst, and that's what she does, she collected data.

Q. Okay. Now, did she provide data to anyone in the company regarding the results of the surveys?

A. She generally kept up with how many - - **we know how many deficiencies per facility we have and the complexity of those deficiencies** by the rating, A, B, C, D, whatever, so she keeps up with that, yes.

Dep. Scott Bell 110:10-111:13 (Dec. 20, 2005) (emphasis added), Ex. H.

The testimony taken in this matter establishes unequivocally that there are genuine issues of material fact that must be determined by a fact finder. The licensee Defendant along with the administrator and corporate Defendants owed a duty to Ms. Weissner, and the breach of this duty was the proximate cause of her horrific injuries. Defendant's motion is clearly without merit and must be denied.

D. Defendant may also be held liable for fraud.

Fraud consists of the following elements: a representation; its falsity; its materiality; the speaker's knowledge of its falsity or ignorance of its truth; the speaker's intent that the representation should be acted upon by the person and in the manner reasonably contemplated; the hearer's ignorance of its falsity; the hearer's reliance on the truth of the representation; the hearer's right to rely thereon; and the hearer's consequent and proximate injury. [Boling v. A-1 Detective & Patrol Service, Inc.](#), 659 So. 2d 586, 590 (Miss. 1995).

Defendants misrepresented themselves as being (1) skilled in the performance of nursing, rehabilitative and other medical support services; (2) properly staffed, supervised, and equipped to meet the total needs of its nursing home residents; (3) able

to specifically meet the total nursing home, medical, and physical therapy needs of Ms. Weissner and other residents like her and (4) licensed and complying on a continual basis with all rules, regulations, and standards established for nursing homes, nursing home licensees and nursing home administrators. Ms. Weissner did not receive care that met the *Minimum Standards*. Defendants knew that the facility did not have sufficient staff, supplies or funds to provide the care Ms. Weissner was promised and to which she and her family agreed. It was material that Ms. Weissner would receive the care that she was promised and for which she paid. Ms. Weissner could no longer take care of herself. She required the level of care that Defendants held themselves out as providing. In fact, the need to receive adequate and appropriate custodial care was the very reason Ms. Weissner was admitted to Defendants' facility.

Defendants knew that Ms. Weissner would not receive the level of care she required and knew that they did not administer that level of care, yet they represented themselves as being a facility licensed by the State of Mississippi, and operating within the rules of the license. Ms. Weissner and her family had no access to Defendants' budget or staff information or any other source of information that could lead them to believe Defendants were misrepresenting the level of care she would receive. Clearly, Ms. Weissner and her family reasonably relied on their representations as true.

Defendants wanted Ms. Weissner's business and wanted her to agree to reside at their facility. Defendants intended for Ms. Weissner to act upon their representations because they were operating to make a profit. The more residents that Defendants could procure meant an increase in profits. This was especially true when, as alleged in Plaintiffs Complaint, they purposely failed to provide the proper care, treatment, and services to Ms. Weissner. For example, Tonya Harris, a certified nursing assistant employed by the facility during Ms. Weissner's residency, testified to the shortage of necessary supplies. See Dep. Tonya Harris 16:13 - 23:24 (Jan. 16, 2004) (testifying to a shortage of protective barriers and items needed to prevent the spread and growth of infection, such as Peri-wash and gloves; testifying to having to use Crisco on residents including Ms. Weissner because there was no lotion; testifying to a shortage of sheets, pads, and linens), Ex. D. Ms. Harris further testified that the facility had the necessary supplies during state inspections but that afterwards things returned "to the normal routine". See Dep. Tonya Harris 21:19-23:24 (Jan. 16, 2004), Ex. D.

Because Defendants held the facility out as a skilled nursing facility in the business of providing long-term care to **elderly** patients, Ms. Weissner had a right to rely on their assertions. As a result of this reliance on Defendant's false representations, she suffered multiple injuries, continuous pain, and ultimately death. All of the elements of common law fraud are present.

E. Defendant may also be held liable for breach of fiduciary duty.

Contrary to Defendants' assertion, under Mississippi law, a fiduciary duty exists between a nursing home and its residents. The term "fiduciary relationship" is a broad term and includes "both technical fiduciary relations and those informal relations which exist wherever one person trusts in or relies upon another." *Hopewell Enter., Inc. v. Trustmark Nat'l Bank*, 680 So. 2d 812, 816 (Miss. 1996) (citing *Lowery v. Guaranty Bank and Trust Co.*, 592 So. 2d 79 (Miss. 1991)).

Whenever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of mind or body, or through trust, the law does not hesitate to characterize such relationship as fiduciary in character."

Madden v. Rhodes, 626 So.2d 608, 617 (Miss. 1993) (citing *Hendricks v. James*, 421 So.2d 1031, 1041 (Miss. 1982) (emphasis added)).

Plaintiff has alleged that a fiduciary relationship existed between Ms. Weissner and Defendants. See Plaintiffs Complaint. Ms. Weissner was admitted to Chateau Deville Nursing Center, a skilled nursing facility, at an advanced age and in need of significant assistance. All Defendants, including the licensee Defendant, were engaged in the custodial care of **elderly**, helpless individuals who are chronically infirm, mentally impaired, and/or in need of nursing care and treatment. Ms. Weissner and her family trusted Defendants' assertion that they could adequately care for her needs. Defendants had a fiduciary and confidential

relationship with Ms. Weissner and her family. The relationship created an affirmative duty to Ms. Weissner and her family to disclose what Defendants knew--that Ms. Weissner would not receive the care she needed at Defendants' facility. Defendants can and should be held liable for a breach of this duty.

III. CONCLUSION

In an all too similar case, the Supreme Court of Florida noted that the defendants could not “escape responsibility by managing its facility with managers who close their eyes, refuse to hear, and dull their sense of smell.” *Beverly Enters.-Florida, Inc. v. Spilman*, 661 So. 2d 867, 873 (Fla. 1995). The Court further noted the responsibilities of the administrator who was at the facility on a daily basis:

[The facility's] administrator testified that she was not familiar with Spilman's plight. Surely she was familiar with the rapid transformations to neatness and cleanliness when a state inspection was imminent. She testified that she was aware of the incompetency of the director of nursing in “managerial organizational skills.” It is difficult to imagine that an employee with managerial responsibilities either knew of Walter Spilman's plight and failed to take any action to assist this totally dependent human being or so totally ignored the operation of the nursing facility that Walter Spilman's plight went unnoticed. Either situation exhibits a reckless disregard of human life or of the safety of persons exposed to its dangerous effects, or reckless indifference to the rights of Walter Spilman for whom the nursing home was being compensated for every detail of sustaining his life in the most dignified and comfortable way possible.

Id. at 873-74.

Justice Sharp, in his concurring opinion in *Spilman* stated, “I write only to say that we should never cease to be shocked by Man's inhumanity to Man, no matter what the circumstances. And, a remedy must always be afforded.” *Id.* The remedy in this case is to allow Plaintiff to proceed against all Defendants responsible for Ms. Weissner's injuries, including the Licensee Defendant.

Defendant, as the nursing home licensee of Chateau Deville Nursing Center during Ms. Weissner's residency, should be held liable for breaching both his common law and statutory duty of care owed to nursing home residents. Mississippi law imposes a duty upon nursing home licensees for the purpose of protecting nursing home residents. This Defendant breached his duty of care, causing injury to Ms. Weissner. Plaintiff's claims against licensee Defendant Scott J. Bell state genuine issues of material fact under Mississippi law. Plaintiff respectfully requests that this Court deny Defendant's Motion and grant any other relief to which she is entitled.

In support of this Response, Plaintiff relies on the following attached exhibits:

Exhibit A - Licenses issued to Scott J. Bell by the State of Mississippi certifying that during the years of Ms. Weissner's residency he was licensed “to maintain and operate an Institution for the Aged or Infirm according to [Section 43-11-9 of the Mississippi Code of 1972](#), as amended, on the premises described to wit: Chateau Deville Nursing Center”;

Exhibit B - Judgments entered by Mississippi courts in favor of nursing home residents against nursing home licensees;

Exhibit C - Excerpts from the Deposition of Fayrella Handy, a certified nursing assistant at Chateau Deville Nursing Center during Ms. Weissner's residency;

Exhibit D - Excerpts from the Deposition of Tonya Harris, a certified nursing assistant at Chateau Deville Nursing Center during Ms. Weissner's residency;

Exhibit E - Excerpts from the Deposition of Donald Glenn, Ms. Weissner's son;

Exhibit F - Excerpts from the Deposition of Expert Lige B. Rushing, Jr., M.D.;

Exhibit G - Excerpts from the Deposition of Expert Gail King, R.N.; and

Exhibit H - Excerpts from the Deposition of Defendant Scott Bell

Footnotes

- 1 See, e.g., *Johnson v. Magnolia Healthcare, Inc.*, Civ. No. 2001-0139CICI (Miss. Cir. Ct.- Leflore County November 25, 2002) (verdict awarding compensatory damages of \$3 million and punitive damages of \$4 million against nursing home licensee, administrator, and nursing home management company jointly and severally); see also *Estate of Charles Edwards v. Manner Health Care, Inc., et al.*, Civ. No. 2001-0172-CI (Miss. Cir. Ct. - Leflore County December 18-19, 2003)(verdict rendered for compensatory damages of \$1.5 million and for punitive damages of \$5 million against defendants, including administrator and licensee); *Crook v. Mariner Health Care, et al.*, Hinds County Circuit Court, First District No. 251-01-1368CIV (judgment entered for compensatory damages of \$2 million and punitive damages of \$8 million against all Defendants, including the licensee). See Plaintiff's Composite Ex. B.
- 2 See [Miss. Code Ann. § 73-17-3, et seq.](#)
- 3 The court cited the following Mississippi Supreme Court decisions:
[J.C. Penney Co. v. Sumrall](#), 318 So.2d 829, 831-32 (Miss.1975) ("the duty of the [defendant store owner and store manager] required them only to eradicate the known dangerous situation within a reasonable time or to exercise reasonable diligence in warning those who were likely to be injured because of the danger"); [Howell v. Ernest Yeager & Sons, Inc.](#), 215 So.2d 702 (Miss.1968) (possible liability on the part of the store owner and manager for employee's dropping of a banana on which plaintiff allegedly fell); [Moore v. Winn-Dixie Stores, Inc.](#), 173 So.2d 603, 608 (Miss.1965) ("question of fact...as to whether or not the banana peel had been on the floor a sufficient length of time to charge the [defendant store owner and store manager] as reasonable and prudent operators of the store with notice of the danger"); [Sears, Roebuck & Co. v. Burke](#), 44 So.2d 448, 451 (Miss.1950) (store owner and manager liable for a customer's injuries sustained when a package fell against her back).